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21 ORACLE AMERICA, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

24 ORACLE AMERICA, INC.,  
25 Plaintiff,  
26 v.  
27 GOOGLE INC.,  
28 Defendant

Case No. CV 10-03561 WHA

**COMMENT ON TENTATIVE ORDER  
CLARIFYING ASSIGNMENT OF RULE  
706 EXPERT (ECF 1384)**

- **Paragraph 4:** Oracle requests that the order make clear that neither party is permitted to make ex parte substantive communications with Dr. Kearl, any of his assistants, or his counsel outside the presence of the other party. Substantive communications include communications regarding Dr. Kearl’s role in the case, any witness or expert testimony, or any expert reports. All written substantive communications Dr. Kearl, his assistants, or his counsel has with either party shall copy the other party in the same instance. All verbal substantive communications Dr. Kearl, his assistants, or his counsel has with either party shall be in the presence of at least one attorney of record from each side.
- **Paragraph 5:** Oracle requests that the order make clear that any questioning by Mr. Cooper at a deposition will not affect the parties’ time limits on depositions.
- **Paragraph 7:** Oracle believes it is premature to issue an order that “Dr. Kearl will testify at trial” given the Court’s statements that it will wait until seeing the expert reports before making its final decision on whether Dr. Kearl will testify. *See* Nov. 19, 2015 Hr’g Tr. at 11-13; ECF 1383 at 9.
- **Paragraph 10:** While not expressly stated, Oracle assumes that notice to both parties will continue to be provided of any communications concerning this case between the Court and either the Rule 706 expert or his counsel. *See e.g. United States v. Craven*, 239 F.3d 91, 102 (1st Cir. 2001); *Fed. Trade Comm’n v. Enforma Nat. Products, Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004) (vacating preliminary injunction in part due to the lack of a record of ex parte communications between the district court and its Rule 706 expert).

1 Dated: December 2, 2015

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